SUBJECT INDEX

	Page
PETITION FOR RECONSIDERATION OF DECISION	1
I. Request for full hearing	3
Introductory statement	3
Principles for determining validity of population disparities	6
Apportionment of representatives to Bexar and Dallas Counties	9
Request that this Court render final judgment	10
II. Request for clarification of the Court's opinion	15
(1) Maximum permissible deviation	17
(2) Whether specific justification must be shown for each district above a *de minimis* deviation	18
(3) What is the maximum *de minimis* variation	18
(4) *De minimis* variations in multi-member districts	19
(5) Grounds for justification	20
(6) Relative importance of maximum deviation range, number of districts with deviations in excess of *de minimis*, and sum of the deviations	23
Prayer	26
MOTION FOR LEAVE TO SUPPLEMENT RECORD	27

CITATIONS

Cases

	Page
Burnette v. Davis, 382 U.S. 42 (1965)	8
Davis v. Mann, 377 U.S. 678 (1964)	12
Drum v. Seawell, 250 F. Supp. 922 (M.D. N. Car. 1966)	7
Forty-Fourth General Assembly v. Lucas, 379 U.S. 693 (1965)	8
Harrison v. Schaefer, 383 U.S. 269 (1966)	8
League of Nebraska Municipalities v. Marsh, 242 F. Supp. 357 (D. Neb. 1965)	8
Lucas v. Colorado General Assembly, 377 U.S. 713 (1964)	4
Maryland Citizens Committee for Fair Congressional Redistricting, Inc. v. Tawes, 253 F. Supp. 731 (D. Md. 1966)	8
Paulson v. Meier, 246 F. Supp. 36 (D. N. Dak. 1965)	8
Preisler v. Secretary of State of Missouri, 257 F. Supp. 953 (W.D. Mo. 1966)	7
Reynolds v. Sims, 377 U.S. 533 (1964)	4, 11, 16, 20, 21
Swann v. Adams, —— U.S. —— (1967)	1, 3, 8, 17, 18

Constitutional Provisions

Texas Constitution, Art. III, Sec. 26	12, 20
United States Constitution, Art. I, Sec. 2	6
United States Constitution, Fourteenth Amendment	6, 8, and *passim*

NO. 235

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

WILLIAM W. KILGARLIN, et al.,
Appellants

vs.

JOHN L. HILL, SECRETARY OF STATE OF THE STATE OF TEXAS, et al.,
Appellees

On Appeal from the United States District Court for the Southern District of Texas, Houston Division

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APPELLEES' PETITION FOR RECONSIDERATION OF DECISION RENDERED ON FEBRUARY 20, 1967

This Court has in effect suspended "rule by law" and dissolved the Legislature of Texas without a hearing. The decision reversing the Court below because of disparities in population between several legislative districts is purportedly based on the decision rendered six weeks earlier in *Swann v. Adams*, ____ U.S. ____. The action is astonishing, to say the least, because appellants brought up scarcely any of the record considered by the Court below on this question. In the absence of the complete record containing the evidence considered by the District Court on the point in issue, by all previously accepted rules of law it would be pre-

sumed that the trial court had decided correctly; that the disparities in population of the several districts involved have been explained and justified; that there was no invidious discrimination between the voters of the various districts. This Court has, by its own decision, however, apparently promulgated a new and novel concept of appellate procedure—the appellee is cast with the burden of proving that the evidence supported the judgment of the lower court rather than the appellant having the obligation to prove his contention that the evidence was insufficient. We present that this apparent rule is a concept foreign to the jurisprudence of this country—it is in fact an extension of the doctrine that an accused is guilty, merely because of the accusation, until he proves himself to be innocent.

If this Court intends to change the rules of procedure, surely appellees are entitled to have notice of such change in order to meet their new burden and bring forward such portions of the record that reflect the evidence considered by the Court below in reaching its decision on this point. Appellees only seek to have an opportunity to show this Court that the facts relied on by the trial court were sufficient by amending the record to allow this Court to consider the same evidence considered by the three judges who previously heard this case, and for appellees to present their brief and oral argument to this Court in light of the evidence actually considered by the trial court. We contend that this Court would reach a vastly different conclusion from that appearing in its per curiam opinion if appellees were given "their day in court." We will discuss these matters in detail in the body of this petition.

I. REQUEST FOR FULL HEARING

Introductory Statement

By this petition appellees ask the Court to reconsider its decision rendered on February 20, 1967, and either to affirm the judgment of the District Court or to set the case for hearing so that appellees may file a brief on the merits and present oral argument to the Court. Ancillary to this request, appellees ask that they be permitted to supplement the record by bringing up additional evidence considered by the District Court.

In the alternative, appellees ask the Court to clarify its judgment and opinion by giving more clearly defined guidelines for the disposition of this case in the District Court.

Appellees earnestly believe that the judgment of the District Court should be summarily affirmed in line with the dissenting opinion in *Swann v. Adams* and the lower court's finding that the deviations in H.B. 195 were supported by constitutionally acceptable state policies. However, in view of the Court's prior opinion in *Swann,* we do not hope to persuade the Court to affirm on the basis of the briefs and record now before it, and we therefore ask that the Court set aside its judgment of February 20 and note probable jurisdiction so that the case may be set for full hearing.

Appellees feel that they have not yet had their day in court. When they filed their motion to affirm, there had been no decision by this Court indicating that deviations of the magnitude found in H.B. 195 would not satisfy Fourteenth Amendment requirements on their face, without any justification being offered by its pro-

ponents. In legislative redistricting cases, the nearest thing to a specific standard which had come from this Court was the reference in *Lucas v. Colorado General Assembly*, 377 U.S. 713, 730 (1964), to a population disparity ratio of 1.7 to 1 as arguably valid. The appeal in *Swann v. Adams* (Docket No. 1314, O.T. 1965) had been filed, but the Court had not yet noted probable jurisdiction.

In the District Court, appellees had contended (and still contend) that deviations no greater than those found in H.B. 195 are valid on their face and need no justification—that as a matter of law the resulting inequality of individual votes is not of sufficient magnitude as to constitute an invidious discrimination against any voter. Moreover, the size of the House with its 150 members produces districts of fairly small population and differences in population between districts show up as much larger percentages than the same differences would produce if the norm were greater. For example, should the size of the House be reduced to 75 members, the same differences in population would be halved percentage-wise.

Nevertheless, appellees had presented evidence justifying the deviations, based on rational state policies which this Court had sanctioned in *Reynolds v. Sims*, 377 U.S. 533 (1964). This evidence was contained in a deposition and statement by Representative G. F. Mutscher, Chairman of the House Committee on Congressional and Legislative Districts, and a deposition by Robert E. Johnson, Executive Director of the Texas Legislative Council, who had been in charge of assistance which the Council had rendered to the Committee in the drafting of H.B. 195.

The District Court rejected defendants' contention that as a matter of law the disparities in H.B. 195 did not offend the Fourteenth Amendment, but it expressly found, as a matter of fact, that there was a rational and permissible legislative policy to sustain the population deviations. Opinion of the Court, 252 F. Supp. at 427-428; concurring opinion, 252 F. Supp. at 448. Although appellees did not agree with the District Court's rejection of their legal theory, they were satisfied with the judgment and did not appeal from it.

In this posture of the case, appellees did not foresee any possibility whatever that the District Court's judgment would be disturbed without an opportunity for a full hearing in this Court. Their motion to affirm was adequately responsive to the jurisdictional statement in keeping with the rules of this Court, and it did not attempt to fulfill the function of a brief on the merits. Appellees ask that they now be given the opportunity to present their case by brief and oral argument.

As already stated, the District Court expressly found as a matter of fact that there was evidence to justify the deviations in H.B. 195. Appellants asked for transmission to this Court of only a small portion of the evidence presented in the District Court and did not include in their designation the full depositions of their witnesses or the depositions and exhibits offered by appellees in support of the deviations.

Since the District Court had made a fact finding on this issue (expressly referring to various pieces of evidence which appellants had not put into the record for this Court, from which it was apparent that the District Court had had other evidence before it), ap-

pellees were of the view that this Court would not overturn the District Court's finding without having before it all the evidence on which the District Court acted, and that it was incumbent upon appellants to take up a record of the entire pertinent evidence if they sought to challenge the District Court's finding. This is the rule commonly applied in appellate review of lower court findings, and appellees had no reason to believe that it would not be applied in this case. Their appraisal of the situation was that appellants were not challenging this *fact finding* and that the only ground on which this Court could reverse the District Court's decision on this issue would be that the deviations were unconstitutionally excessive as a matter of law, in which event additional evidence would have been unavailing. Consequently, appellees did not file a cross-designation for transmission of additional portions of the record.

Principles for Determining Validity of Population Disparities

We submit that this Court has fallen into the error of applying to legislative districts the standard of strict adherence to population equality for congressional districts under Article I, Section 2 of the Constitution rather than the standard of invidious discrimination under the Fourteenth Amendment. It is evaluating the apportionment in terms of what could be done to bring the population closer to an exactly equal division—that is, equal population "as nearly as may be" as required by Article I, Section 2—rather than in terms of substantial equality in treatment of individual voters.

The opinion in *Preisler v. Secretary of State of Missouri,* 257 F. Supp. 953 (W.D. Mo. 1966), which this Court affirmed on January 9, 1967, discussed these differences at great length, and illustrated the application of the two sets of rules by citing *Drum v. Seawell,* 250 F. Supp. 922 (M.D. N. Car. 1966), in which the Court approved a state legislative reapportionment plan having population variances greater than those involved in a congressional redistricting plan which it invalidated in the same opinion—and greater than those contained in H.B. 195. The Court's conclusion that the disparities were not so extreme as to violate constitutional requirements apparently was not based on a consideration of "justifying" state policies. In other words, the Court found that the population differences needed no justification because on their face they were not so extreme as to be invidious.

The limit of *de minimis* variations for congressional apportionment is lower than for apportionment of state legislatures because the starting point for measurement under Article I, Section 2 is zero—absolute equality in number of inhabitants, and the outer limit for permissible variations stops at absolute numerical equality as nearly as may be practicable. But under the Fourteenth Amendment the measurement is in terms of substantial equality in the weight of individual votes.

Appellees argued in the District Court that as a matter of law the deviations in H.B. 195 are not invalid, because as a matter of law the resulting inequality in voting strength is not sufficiently great to reach the point of invidiousness. Until this Court's decision in *Swann v. Adams,* this view was widely accepted by

jurists, scholars of constitutional law, and political scientists. The failure of plaintiffs in *44th General Assembly v. Lucas,* 379 U.S. 693, *Burnette v. Davis,* 382 U.S. 42, and *Harrison v. Schaefer,* 383 U.S. 269, to raise the issue of population disparities undoubtedly is to be explained by their concurrence in the belief that the deviations in those cases did not invalidate the apportionments.

Cases which this Court cited with approval in *Swann* are not precedents for what should be considered *de minimis* in this case. *Maryland Citizens Committee for Fair Congressional Redistricting, Inc. v. Tawes,* 253 F. Supp. 731 (D. Md. 1966), is a congressional districting case. *League of Nebraska Municipalities v. Marsh,* 242 F. Supp. 357 (D. Neb. 1965), involved a plan for a *unicameral* legislature with deviations ranging from —20.99% to +26.61%, greatly in excess of the range in H.B. 195. In *Paulson v. Meier,* 246 F. Supp. 36 (D. N. Dak. 1965), also with deviations exceeding those in H.B. 195 (—14.06% to +19.44%), senate and house districts were identical and, as in the Nebraska case, there was no opportunity for compensating distribution of members in another branch of the Legislature. Appellees still believe that their contention is sound, and they now urge this Court to reconsider the question and affirm the judgment of the District Court on this ground.

Although the District Court rejected appellees' contention on the limit of *de minimis* variations, the main opinion did properly place upon those attacking the apportionment the burden of showing unconstitutionality. This accords with the view expressed in the dissenting opinion in *Swann v. Adams.* We are in full

agreement with that opinion and we respectfully ask the Court for the opportunity to develop both grounds which Mr. Justice Harlan stated for affirmance of the lower court's decision.

Apportionment of Representatives to Bexar and Dallas Counties

The Court has ordered apportionment of one more representative to Bexar County and to Dallas County if other districts can be re-formed within county lines in such a way as to afford them the additional member and at the same time to afford the re-formed districts constitutional representation.

Earlier in the opinion the Court intimated that the justifiable deviation in multi-member districts is measured by a different rule than that allowable in single-member districts when it stated the number of single-member districts having a deviation greater than 10% from the norm, but used a deviation of 6% for multi-member districts. The holding on the Dallas and Bexar apportionments seems to be a further advancement of that view. We submit that here again the Court is erroneously using congressional apportionment standards in making a distinction between the single-member and the multi-member districts.

The test under the Fourteenth Amendment is whether there is an invidious impairment of the comparative value of individual votes as between the residents of different districts. This Court does not question that the proper method for measuring the weight of individual votes in a multi-member district is to divide the district population by the number of members assigned

to the district and then to compare the quotient with the population (or population quotient) in the "ideal" district or in other districts.[1] Applying this method to H.B. 195, Bexar County voters are under-represented by 7.60% below the norm, and Dallas County voters by 6.42%. These percentages are substantially below the 10% which the Court has indicated as the limit of *de minimis* variations in single-member districts.

If a resident of a single-member district which is under-represented by 10% is not denied equal protection, by what reasoning can it be said that the resident of a multi-member district whose vote has the same relative worth is being denied equal protection? The voter in each type of district is concerned with the relative value of his vote, and so long as the value is the same, it makes no difference whether he lives in a single-member or multi-member district.

If the Court does not affirm the District Court's judgment *in toto,* we ask that it reconsider this portion of its opinion and modify its ruling so as to place multi-member districts on the same footing with single-member districts, the apportionment to each type of district to be tested by the weight of the individual votes of its residents.

Request That This Court Render Final Judgment

We have already explained why appellees did not

[1]We lay aside any consideration of the suggestion in the article cited in footnote 3 of the Court's opinion that voters in multi-member districts inherently have greater voting power than those living in single-member districts. We accept, as does the Court, that for the purpose of deciding this case district population divided by number of representatives apportioned to the district is the basis for measuring individual voting power.

take up a fuller record. We believe an examination of the entire record would convince this Court that the evidence before the District Court did in fact justify the disparities in H.B. 195 which that Court held to be valid.

This Court has placed much emphasis on the fact that appellants offered in evidence three plans which achieved a more nearly equal population division than H.B. 195. The Court is aware that respect for county lines was a state policy entering into H.B. 195 and that one of appellants' plans (the Arnold Foundation Monograph plan) violates this policy. But it has not heretofore been brought clearly to the Court's attention that both this plan and the other two plans (PARC Plan A and PARC Plan B) violated another state policy contained in the Texas Constitution, namely, a policy to give separate *independent* representation to each county which has sufficient population to entitle it to one or more representatives. This was sanctioned as an acceptable state policy in *Reynolds v. Sims*, 377 U.S. at 580.

The letter of the Texas Attorney General quoted in footnote 2 of this Court's opinion in *Kilgarlin* sets out certain rules contained in the Texas Constitution, but it fails clearly to elucidate the rule on independent representation for counties. However, the Legislature was cognizant of this rule and sought to follow it in H.B. 195.

A few days prior to the date on which the Attorney General's letter was written, he had held a conference with several Representatives, including Chairman Mutscher of the House Committee on Legislative Districts, to discuss whether it was permissible under the

Texas Constitution to cleave off a portion of a county and attach it to another county or counties, and whether it was permissible to form multi-county multi-member districts. At this conference the Attorney General expressed the opinion that whenever a county had sufficient population to entitle it to one or more representatives, this number should be assigned to the county for election from that county alone; and that for any surplus of population above the whole number of representatives to which it was entitled, the county should be attached to another county or counties to form a flotorial district. This advice was based on his interpretation of the following provision in Article III, Section 26 of the Texas Constitution:

> "* * * whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed *into a separate representative district,* * * * and whenever any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a representative district with any other contiguous county or counties." (Emphasis added.)

At this conference the Attorney General also expressed the opinion that under both the Texas Constitution and the United States Constitution, it was not necessary to provide separate independent representation for the county or counties to which the county with a surplus population was attached. The advice with respect to the federal Constitution was based on the belief that the flotorial district described in footnote 2 of *Davis v. Mann,* 377 U.S. 678, 686 (1964), was an example of a flotorial district which would comply with

the demands of the Fourteenth Amendment. The district as described in the footnote did not provide separate representation for Amherst County, and as so described it was subject to the same criticism which caused the District Court to invalidate similar flotorial districts which found their way into H.B. 195 as a result of the Attorney General's advice. A statement by Chairman Mutscher which is in evidence in this case summarizes the advice given at this conference.

The state policy against multi-county multi-member districts is stated imperfectly in numbered paragraph 1 of the Attorney General's letter footnoted in *Kilgarlin* but perhaps is not articulated with sufficient clarity to be apparent to the reader.

With reference to the Court's statement that Texas policy permits, where necessary, the violation of county lines in order to surmount undue population variations, it might be observed that paragraph 4 of the Attorney General's letter was not enunciating a policy flowing from the Constitution or laws of Texas but rather a procedure which the Legislature might be obliged to adopt because of the supremacy clause of the federal Constitution.

Thus, it is seen that appellants have not shown that the Legislature could have devised a plan meeting both these requirements of the Texas Constitution which would have produced smaller deviations than H.B. 195. Furthermore, the evidence before the District Court showed that other acceptable state policies which Chairman Mutscher testified went into the construction of H.B. 195 were completely disregarded in the three "model" plans.

Appellants did not include in the record to this Court

the portions of depositions, taken at their request, of the individuals who prepared these plans, in which the witnesses testified concerning the policies that they had followed. Samuel B. Hamlett, who helped prepare the Arnold Foundation Monograph plan, testified in substance that population equality was the only policy consideration sought to be effected in the plan, and that counties were kept intact to the extent that it was done only because they afforded available and more or less stable units of population in the census enumerations.

Professor Clifton McCleskey testified with respect to PARC Plans A and B that he did not want to cross county lines or break counties, but other than this, his objectives were solely compactness, contiguity and population equality.

Appellees are filing, as a part of this petition for rehearing, a motion asking that they be allowed to bring up additional portions of the record so that this Court may render a final judgment on the validity of H.B. 195 after considering all of the evidence available to the court below. We realize that the Court's order of reversal and remand leaves the matter open in the District Court, but we submit that this Court is the proper forum for final disposition of the question. If the case is remanded, we foresee great uncertainty on the part of the District Court (as now exists with appellees) in knowing the specific standards which this Court expects it to follow and how they are to be applied in order to meet with this Court's approval.

If this Court does not reconsider its decision and render a final judgment on the validity of H.B. 195, then we respectfully ask the Court to furnish much-needed guidelines to the District Court in a supplemental opinion.

II. REQUEST FOR CLARIFICATION OF THE COURT'S OPINION

By this Court's order, both the District Court and the Texas Legislature will be called upon to measure population deviations in redistricting plans in the light of standards laid down by this Court in its opinions in this case and in *Swann v. Adams*. Actually, the Court has not laid down any firm standards for their guidance, and they will be groping in still-uncharted waters unless the Court gives them something more concrete and specific than they now have. Both bodies run the risk on the one hand of following a set of standards which will not meet with this Court's approval, resulting in a trial-and-error process of trying to reach an acceptable piece of legislation, or, on the other hand, of overcautiously applying standards more strict than are demanded, thereby causing an impingement on the freedom and independence of the legislative branch of government.

The Texas Legislature is now meeting in a regular biennial session which will continue until the latter part of May of this year. Upon adjournment of that session, the Legislature will not be again in session until January, 1969, unless called into special session by the Governor. The deadline for candidates to file in the primaries for the 1968 elections is the first Monday in February, 1968. These timetables point up how important it is that the Legislature enact a valid redistricting plan the first time around—a plan that all interested parties will recognize as valid, so that there will be no occasion for appeals to this Court, special sessions of the Legislature, and other delays and inconveniences.

Apart from the time schedule, the Legislature also

needs to know of a certainty whether the plan it is enacting is valid, in order to minimize the disruptive effect on the Legislature of the necessity for reapportioning its members, by getting the job finished the first time around. But in fairness, the Legislature should not be put to the necessity of adopting stricter standards, against its will, than the Constitution requires. If there is any truth at all to the constantly reiterated statement that apportionment is a legislative function, the Legislature is entitled to know the bounds of its discretion before it acts.

In asking the Court for a clarification of the guidelines, we realize that "what is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case." *Reynolds v. Sims,* 377 U. S. at 578. We are not asking the Court to lay down guidelines that will govern any state apportionment other than the State of Texas under existing facts and circumstances.

Listed below is a series of questions which will confront both the District Court and the Legislature. While a *seriatim* answer to each question would be most helpful, we will be happy to have any discussion, however arranged, which supplies the answers.

Before stating our specific questions, we wish again to point out that all three plans which appellants offered in evidence violate the Texas Constitution, one by dividing counties and the other two by creating multi-county multi-member districts. The Texas Constitution provides for single-member districts, single-county multi-member districts, and flotorial districts, but does not provide for multi-county multi-member districts. As the District Court pointed out, 252 F.

Supp. at 422, it might be possible to devise a flotorial-district plan for Texas which would satisfy both the federal and state Constitutions. This possibility should be kept open for the Legislature.

We make these observations by way of underscoring that neither of the three "model" plans dictates a deviation range indicating what the Legislature could have done or should have done *because neither accommodated permissible state policy,* and therefore, that our questions which hypothesize deviations greater than those found in the three "model" plans or different from those found in H.B. 195 are not frivolous.

(1) *Maximum deviation.* This Court has not set out a specific standard either as to the maximum permissible deviation beyond which there can be no justification, or as to the range of the so-called *de minimis* deviations within which justification is not required. We know the Court has said that a deviation range as great as —14.84% to +11.64% cannot stand unless it is justified on the ground of acceptable state policy. But the Court beclouds the susceptibility of this full range to justification by stating that "we are doubtful that the deviations evident in H.B. 195 are the kind of 'minor' variations which might be justified by local policies." The matter is further beclouded by the fact that the opinion in *Swann* does not suggest that any of the variations contained in the Florida act, some of which exceed the maximum variation in H.B. 195, might be so great as to be impermissible on any ground. When and how is this doubt to be resolved? Must the Legislature risk a further reversal if it uses deviations of this magnitude for the sake

of preserving policies fixed by the Texas Constitution? We ask that the Court resolve this doubt now, by stating whether the maximum deviations in H.B. 195 are or are not susceptible of justification; and if not, by further stating the limits of justifiable deviations.

(2) *Whether specific justification must be shown for each district above a* de minimis *deviation.* While we do not interpret the Court's opinions in *Swann* and *Kilgarlin* to require justification for each district, one by one, deviating from the norm in excess of a *de minimis,* we nevertheless envision a possibility that they might be so construed. Such a demand would be wholly unrealistic and virtually impossible to meet, in view of the chain-reaction nature of working out district lines. In order to remove any doubt, we ask for clarification of this point.

(3) *What is the maximum* de minimis *variation.* If the Court's answer to the foregoing question is that in order to sustain the validity of a redistricting plan the proponents must show that for each district in excess of a certain percentage of population variation above or below the norm, the district lines were drawn to effectuate a constitutionally acceptable state policy which could not otherwise have been carried out, we ask for clarification of the dividing line between *de minimis* variations and those for which justification must be shown. In both *Swann* and *Kilgarlin,* the opinions suggest that in a state which has adopted the policy of preserving the integrity of county lines, further justification is not required (at least in single-member districts) for variations of less than 10%. We base this conclusion on the fact that in each opinion the Court gives statistics on the num-

ber of districts varying by more than 10% and makes no mention of single-member districts which vary by a smaller percentage. Is this a correct conclusion? If it is not correct, what is the maximum degree of variation for which specific justification is not required?[2]

(4) De minimis *variations in multi-member districts.* The opinion in *Kilgarlin* suggests that *de minimis* limits are smaller for multi-member districts than for single-member districts, and indicates that further justification is not required for variations of less than 6% in the multi-member districts. Our inference is drawn from the following statements in the opinion:

> "* * * The deviation from the average population per representative is greater than 10% in 12 single-member districts, and a total of 55 representatives would be elected from eight multi-member districts in which the population per representative varies from the ideal by more than 6%."

> "* * * Another five representatives [in present flotorial districts reconstituted as multi-member districts] would be elected from districts over-represented by 8% or more."

Not mentioned by the Court are reconstituted Districts 47 and 48F, having the next highest variation among the reconstituted districts, which would be over-represented by 5.70%. We take this omission as indicating that the Court did not disapprove of this variation.

In an earlier section of this petition we have questioned the soundness of making a distinction between

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[2]Questions 3 and 4 seek to arrive at the starting point for requiring *additional* justification in a plan embracing the policy of preserving county integrity.

the two types of districts. We ask for clarification of the Court's holding on this point.

(5) *Grounds for justification—recognition of historical boundary lines. Swann* enumerates three state policies which may justify deviations, as follows: (a) the integrity of political subdivisions, (b) the maintenance of compactness and contiguity in legislative districts, and (c) the recognition of natural or historical boundary lines. We interpret "recognition of historical boundary lines" as including a policy to preserve existing legislative district lines. Is this interpretation correct?

—*Independent representation for political subdivisions. Reynolds v. Sims,* 377 U.S. at 580, suggests that another justifying policy is "according political subdivisions some independent representation in at least one body of the state legislature." As previously noted in this petition, the policy of independent representation for counties is enunciated in Article III, Section 26 of the Texas Constitution, which provides that "whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate representative district." We believe that this policy is an acceptable ground for justification, and we would like a verification of this belief.

We also request some criterion as to the amount of deviation which this policy will sustain, and for that purpose we call the Court's attention to two districts in particular which exemplify an application of the policy in H.B. 195. This policy, together with the policy not to divide counties, accounts for the variation of +8.72% in single-member District 13 (Gregg County, with population of 69,436) and +9.90% in

two-member District 21 (Galveston County, with population of 140,364). If the policy against dividing a county would not be sufficient justification for this deviation in District 21 (see Question No. 4), would this additional ground provide sufficient justification for it?

The Legislature was fearful that any deviation in excess of 15% would be held invalid, and counties having a surplus of this magnitude above the district norm were placed into flotorial districts. Thus, Grayson County with a population of 73,043 (14.37% above norm) was given separate representation as District 31 and was placed in flotorial District 32 with Collin County. In view of the fact that the flotorial districts must be rearranged, it becomes important to know whether the policy of independent representation would support this deviation of +14.37%.

—*Community of interests.* Chairman Mutscher testified that economic interests were considered in drawing the boundary lines for H.B. 195 and that an effort was made to obtain a homogeneity of interests within each district insofar as feasible. For example, a county having oil and gas industries would be placed into a district with other counties of like interests in preference to placing it with counties whose primary industries were farming and ranching. Many lower courts have approved community of interests as a permissible ground for justifying deviations, and appellees firmly believe that this should be an acceptable basis for justification. The matter was brushed in *Reynolds v. Sims,* but this Court has never spoken clearly on it. Whether or not this is a factor which would have weight toward justifying a deviation needs clarification.

—*Compactness and contiguity.* Maintenance of compactness and contiguity is one of the acceptable grounds on which deviations can be justified, and we wish to obtain some clarification as to the weight that can be given to this policy. Because it is impossible to state a definite general rule, we are submitting a concrete example from H.B. 195 with the thought that a discussion of the policy as applied in this situation will help clarify the matter.

Reproduced below are maps of the northeast corner of Texas showing the districting under H. B. 195 and under each of the three plans which appellants offered in evidence.

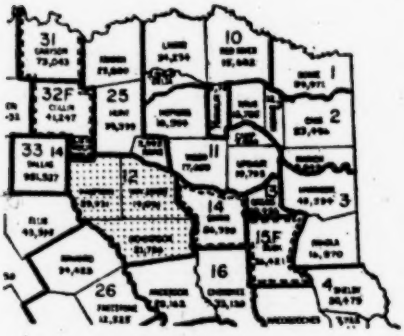

Fig. 1. H.B. 195

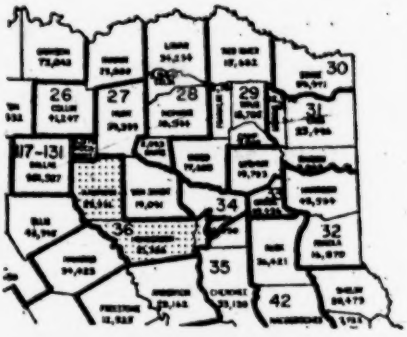

Fig. 2. Arnold Foundation Monograph Plan

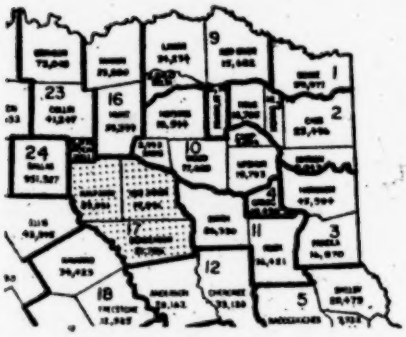

Fig. 3. PARC Plan A

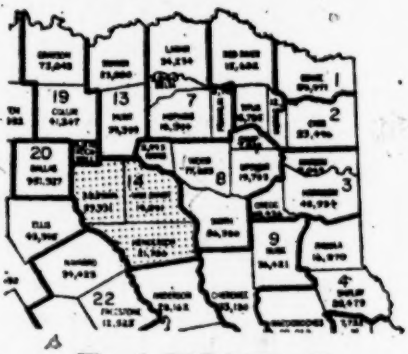

Fig. 4. PARC Plan B

District 12 in H.B. 195, which is identical with District 17 in PARC Plan A and District 14 in PARC Plan B, has a deviation of +10.87% (erroneously stated as +11.09% in Plaintiffs' Exhibit No. 1). District 36 in the Arnold Foundation plan, having a deviation of —6.01%, quite obviously lacks the compactness of District 12 in H.B. 195. For the purpose of this example, we disregard the further circumstance that District 36 is made up in part of a portion of Smith County and therefore violates the state policy for preservation of county integrity. In the light of the population and configuration of surrounding districts in each plan, it appears that the policy of compactness should justify the deviation in District 12 if any weight at all can be given to it. Solely on the basis of the degree of deviation and the configuration of the districts, does the deviation in District 12 violate the Fourteenth Amendment requirement? If it does not, would the same be true if the deviation was +14%? If it was —14%?

(6) *Relative importance of maximum deviation range, number of districts with deviations in excess of* de minimis, *and sum of the deviations.* The District Court has already invalidated the flotorial districts in H.B. 195, and if this Court's opinion stands unmodified, it makes the District Court's reconstitution of these districts suspect. Almost certainly, either the Texas Legislature or the District Court would have to devise new boundaries for some of the districts in Texas before the next election. In order to evaluate the validity of plans under consideration, each body will need clarification as to the relative importance of (a) maximum range of deviation, (b) number of districts having deviations in excess of *de minimis,*

and (c) the sum of the deviations in districts exceeding *de minimis*. Again, we realize the difficulty of laying down any concrete guidelines by an abstract discussion of the matter, and we therefore are submitting a number of hypothetical situations from which some more or less definite conclusions might be indicated. We have simplified the statistics used, for ease of illustration and discussion.

—*Under-represented districts having* de minimis *deviation from the norm.* We take it as established that only those citizens living in under-represented districts have standing to attack an apportionment plan on the ground of population deviations. Additional clarification should be made as to whether under-representation is measured solely by deviation from the norm, or whether it is measured solely by comparison with over-represented districts, or by a combination of these two comparisons. Suppose no under-represented district had a deviation in population exceeding 2% above the norm (we choose this extremely low figure to avoid any complication as to what would be *de minimis*). Would any person have standing to attack the plan on the ground of excessive deviations?* Could a court require justification of over-represented districts which exceed a *de minimis* deviation from the norm?

Suppose in the Texas House, with a membership of 150, 15 members were to be elected from districts having population of less than 10% below the norm, 15 were to be elected from districts having popula-

*The District Court having jurisdiction of this case has freely allowed interventions, and the special circumstances of *Swann* are not present.

tion between 10% and 15% below the norm, and the remaining 120 representatives were all to be elected from districts having population of not more than 2% above the norm. In comparison with the norm, undoubtedly no under-representation would exceed *de minimis*. In these circumstances, would justification be required for any of the over-represented districts?

—*Effect of isolated deviations exceeding* de minimis. Suppose all districts except two are within the *de minimis* range under an apportionment based on the policy against dividing counties—in other words, none of the other districts would need further justification. In order to accommodate the state policy for separate independent representation, one single-county district is over-represented by 18% and another is under-represented to approximately the same degree (a deviation exceeding any in H.B. 195 but within the range of deviations in *Swann*). Would this state policy justify these two deviations?

—*Relative importance of the sum of the deviations.* Suppose the Legislature had a choice between two plans, each of which observed the same acceptable state policies. In one plan, there were two under-represented districts outside the *de minimis* range but within the range for justification, while in the other plan there was only one such district. However, the sum of the deviations in excess of *de minimis* in the two districts was no greater that the *de minimis* excess in the under-represented district in the second plan. Would the fact that fewer voters were under-represented in the second plan compel the Legislature to have to accept it? Conversely, would the fact that the individual voters suffered a smaller degree of ine-

quality under the first plan compel the Legislature to have to accept it? Or would the Legislature have a free choice?

PRAYER

Appellees pray that the Court grant this petition for rehearing and either affirm the judgment of the District Court or note probable jurisdiction in this cause and set it for plenary consideration, with briefs on the merits and oral argument.

In the alternative, appellees pray that the Court issue a supplemental opinion clarifying its opinion of date February 20, 1967, in the respects requested in this petition.

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I certify that the foregoing petition for rehearing is presented in good faith and not for delay.

HAWTHORNE PHILLIPS

MOTION FOR LEAVE TO SUPPLEMENT RECORD

For the reasons stated on pp. 10-14 of the foregoing petition for rehearing, appellants move the Court for an appropriate order permitting them to file with the Clerk of this Court, within 20 days after the granting of this motion, the following documents which were introduced in evidence upon the trial of this case in the District Court:

1. Plaintiffs' Exhibit No. 11 (Arnold Foundation Monograph XIII: Legislative Redistricting in Texas), pp. 1-14.

2. Plaintiffs' Exhibit No. 12 (Deposition of Samuel B. Hamlett—same as Defendants' Exhibit No. 14), pp. 1-4, 44-82.

3. Plaintiffs' Exhibit No. 14 (Deposition of Dr. Clifton McCleskey—same as Defendants' Exhibit No. 16), pp. 1-4, 25-30.

4. Defendants' Exhibit No. 18 (Deposition of Robert E. Johnson—same as Plaintiffs' Exhibit No. 16).

5. Defendants' Exhibit No. 19 (Deposition of G. F. Mutscher—same as Plaintiffs' Exhibit No. 17).

6. Defendants' Exhibit No. 1 (Compilation of Laws of Texas Relating to Apportionment of Representative Districts, 1845-1961).

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CERTIFICATE OF SERVICE

I, Hawthorne Phillips, one of the attorneys for appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of March, 1967, I served copies of the foregoing Petition for Rehearing and Motion for Leave to Supplement Record on appellants by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorney of record, William E. Wright, 1141 Esperson Building, Houston, Texas 77002.

HAWTHORNE PHILLIPS